United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

75-7669

To be argued by
NORTON I. KATZ

UNITED STATES COURT OF APPEALS

For The Second Circuit

B

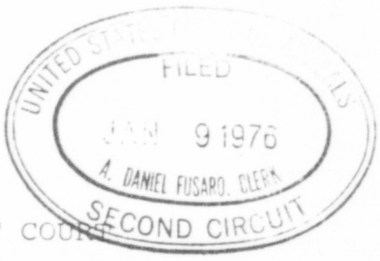
WEITNAUER TRADING COMPANY LTD.,

Plaintiff-Judgment
Creditor-Appellee,

-against-

MORTON L. ANNIS,

Defendant-Judgment
Debtor-Appellant.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RICH KRINSLY POSES KATZ & LILLIENSTEIN
Attorneys for Defendant-Judgment
Debtor-Appellant
99 Park Avenue
New York, New York 10016
867-7200

NORTON I. KATZ
LESLIE D. CORWIN
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
For the Second Circuit

WEITNAUER TRADING COMPANY LTD.,

Plaintiff-Judgment
Creditor-Appellee

- against -

MORTON L. ANNIS,

Defendant-Judgment
Debtor-Appellant

On Appeal From the United States District Court for the Southern District of New York

---

BRIEF FOR DEFENDANT-JUDGMENT DEBTOR-APPELLANT

PRELIMINARY STATEMENT

This is an appeal by the Defendant-Judgment Debtor-Appellant from an order of the United States District Court for the Southern District of New York (Honorable Robert L. Carter, District Judge), which order was filed and entered on December 18, 1975 (DSA 100-103)*.

---

*References to pages of the Supplemental Appendix are hereinafter designated by the prefix (DSA).

The order granted the Plaintiff-Judgment Creditor-Appellee's motion for an order punishing the Defendant-Judgment Debtor-Appellant for contempt of an installment payment order entered in the Court below on October 30, 1975 (A330-332)**; ordered the Appellant to pay a fine in the sum of $34,031.34 together with $1,595.00 as reasonable attorneys' fees; and directed Appellant's confinement in the Metropolitan Correction Center of New York pending payment of the aforesaid fine, but not in excess of six months.

It should be noted that by stipulation dated January 6, 1976 between counsel for the Appellee and counsel for the Appellant the argument of the appeal herein was consolidated with the argument of the Appellant's appeal from the order of the District Court, Southern District of New York, made and entered October 30, 1975 (hereinafter called "the installment payment order"). Said stipulation was approved and "So Ordered" by the Honorable Walter R. Mansfield , Circuit Judge of this Court on January 8 , 1976.

** References to pages of the Appendix are hereinafter designated by the prefix (A).

As background for this appeal, we respectfully refer the Court to the preliminary statement (p. 1-7) of Appellant's brief submitted on December 31, 1975 in support of Appellant's appeal to this Court from the installment payment order.

On or about December 3, 1975 Appellee, by order to show cause signed by Judge Carter, instituted a motion to adjudge Appellant in contempt of the installment payment order (hereinafter called "the contempt motion") (DSA 3-4). These motion papers were never served personally on Appellant, but instead, were served by hand upon Appellant's attorneys on December 3, 1975 (DSA 4).

It should be noted for the record that the contempt motion was filed after the Appellant had already filed and served his Notice of Appeal from the installment payment order. (A344-A345)

Later in the day of December 3, 1975, Appellant's attorneys served and filed two affidavits in response to the contempt motion (DSA 13-20). These affidavits did not purport to deal with the merits of Appellee's motion, but were filed as a matter of personal privilege of Appellant's attorneys for the sole purpose of correcting two gross misstatements in the affidavit of Victor A. Kovner, Esq., submitted in support of the contempt motion.

In its order to show cause, the Court below

designated December 9, 1975 as the return date of the contempt motion. On December 9, 1975, Appellant's attorneys appeared and cross-moved for (1) an order staying execution of any proceedings to enforce the installment payment order pending appeal, and (2) an order modifying or amending the installment payment order. By affidavit (DSA 23), Appellant's attorneys also strenuously opposed Appellee's attempt to have Appellant held in contempt of court.

The affidavit of Leslie D. Corwin, sworn to December 8, 1975 (DSA 23-B), expressly placed in issue the Appellant's ability to meet the requirements of the installment payment order. The affidavit raised the factual issues that the Appellant "is semi-retired and for over a year has suffered from cancer and has been in and out of hospitals; he receives Cobalt treatment and has incurred large hospital bills and related expenses; he is 'in dire financial straits and is in no position to meet the stringent monetary requirements for sufficient security for the payment of judgment currently entered against him * * * '" (DSA 24), and argued that the Appellant should be granted a hearing as to his ability to meet the terms of the installment payment order (DSA 37), before being adjudged in contempt of court.

The Corwin affidavit also pointed out to the Court below that the Appellant was deprived of the use of funds from

General Cigar Corporation (the sum of $26,041.67) for well over a year (DSA 27); that this was a direct result of the improper restraining notice held by it to have been issued by Appellee to General Cigar Corporation (DSA 27); and this was one of the predominant reasons why Appellant was unable to meet the requirements of the retroactive installment payment order and found himself confronted with a motion which sought to have him held in contempt of court (DSA 26).

The Court below heard only oral argument on the motion and cross-motion and from the bench, granted the Appellee's motion to adjudge Appellant in contempt and denied the Appellant's cross-motions. The Court below stated that its order denying the cross-motion would be then and there entered upon the motion papers and become effective as an order of the District Court.

The Court below stated no grounds for denial of the cross-motions other than to state that the papers submitted by the Appellant did not put in issue the Appellant's non-compliance with the order appealed from, and that the procedure of denial from the bench without formal order, other than the written endorsement of the motion papers, was the Court's method of disposing of motions which it felt to be patently without merit (DSA 46). No stenographic transcript of the proceedings on the return of the motion and cross-motions was made.

At 10:50 A. M. on December 9, 1975, roughly one hour after the Court below rendered its decision on Appellee's contempt motion, Appellant's attorneys were served by the attorneys for the Appellee with a proposed order, noticed for settlement on December 11, 1975 at noon, adjudging the Appellant to be guilty of contempt of the Court below and directing payment of a fine and attorneys' fees and further directing that a United States Marshal, upon receipt of a certified copy of the order, be directed to take the Appellant into custody and incarcerate him in a Federal House of Detention until the arrears due under the order were paid (DSA 54-56).

Late in the afternoon of December 9, 1975, Appellant filed and served with this Court a Motion for Stay pending appeal (DSA 43-44). Said motion sought to stay enforcement of the installment payment order pending the disposition of Appellant's appeal to this Court from the order and further sought an order in the nature of a writ of prohibition to restrain the issuance of the contempt order without hearing. This Court then directed Appellant's attorneys to move the Court below for a stay of its installment payment order ex parte. Appellant's attorneys did so at 5:00 P. M. on December 9, 1975 (DSA 57-59), and the motion was once again denied by Judge Carter. Consequently, this Court set December 11, 1975 at 10:30 A. M. for the hearing of

the Appellant's motion for a stay pending appeal.

On December 11, 1975, this Court heard oral argument of Appellant's motion for a stay pending determination of the appeal and granted the motion "on consideration that Appellant shall post a $50,000 supersedeas bond on or before Monday, December 15, 1975." The Court also ordered that "Appellant shall file the record on or before December 19, 1975 and file a brief and joint appendix on or before December 31, 1975; Appellee shall file a brief on or before January 9, 1976 and the appeal shall be set for argument during the week starting January 14, 1976 (DSA 87)."

Pursuant to a discussion held in open Court, counsel for the Appellee agreed to withdraw its contempt order noticed for settlement before Judge Carter at noon that day on the condition that Appellant post the required supersedeas bond.

Appellant was unable to post the required supersedeas bond on December 15, 1975, and by letter of that date, Appellant's attorneys advised this Court of that fact (DSA 93-94). Appellant thereupon moved this Court for a stay of all proceedings pending the disposition of his appeal of the installment payment order without the requirement of the posting of a supersedeas bond.(DSA88) That motion was denied on December 16, 1975 by this Court (DSA 99).

Counsel for the Appellee then noticed for settlement for December 18, 1975 at 2:30 P. M., an order adjudging Appellant in contempt. The order (DSA100-103) was signed in Judge Carter's chambers with only counsel for the Appellee and Appellant present. The order adjudged the Appellant in contempt of court and directed his imprisonment in the New York City Metropolitan Correction Center until the payment of a fine in the sum of $34,031.34 together with $1,595.00 as reasonable attorneys' fees. The order for contempt signed by the Court below stated as a finding of fact that "defendant had notice of the order of this Court entered October 30, 1975, directing him to make installment payments." That finding is utterly without foundation on the record, and the contrary is indicated (DSA 115).

Further, the order of contempt contains a finding of fact that "at no time subsequent to entry of the Order on October 30, 1975 and prior to the return date of this motion on December 9, 1975 did defendant move or otherwise take any steps to explain or represent to the Court any reasons why he could not comply with the Order and make the payments required thereunder." Appellant argued that this was a highly unfair finding in view of the fact that, on or about November 21, 1975, Appellant filed a Notice of Appeal from the installment payment

order. (A344-345) Furthermore, nowhere in the rules of the Court below do we find such a stringent requirement. Most important, it has since been made clear that that burden may not constitutionally be imposed on Appellant. (Vail v. Quinlan, S.D.N.Y. Jan. 7, 1976)*

Immediately, upon the signing of the contempt order in Judge Carter's chambers, Appellant's attorneys moved orally and by affidavit for a stay of execution of the contempt order pending the determination of Appellant's appeal to this Court of that order (DSA 108-116). A transcript was made of this proceeding (DSA 118-124).

Appellant's motion for a stay of the contempt order was denied (DSA 124) and the Court below entered an order and memorandum endorsement on the back of Appellant's motion papers. (DSA 117).

Thereupon, that same afternoon, Appellant moved this Court to stay enforcement of the contempt order signed by the Court below pending the disposition of this appeal. Motion papers were served and filed with this Court and on January 8, 1976, three weeks after submission, this Court denied that motion; ordered appellant to pay $100 in costs; and further enjoined appellant and his attorney from filing any further

motion for a stay pending appeal or any motion seeking similar relief. A copy of that order is annexed to this brief.

---

*Opinion No. 43671 (before three-judge court).

THE QUESTIONS PRESENTED

1. Was the procedure followed by the Court below unconstitutional and based on an unconstitutional foundation and rule? The Court below implicitly held in the negative. Appellant contends that the procedural system invoked violated his constitutional rights.

2. Was the Court below in error in holding appellant in contempt without holding an evidentiary hearing to determine his ability to meet the requirements of the installment payment order? The Court below held that it was not (DSA 40). Appellant contends that such a failure was erroneous as a matter of law and violated his constitutional rights.

3. Was the Court below in error in stating as a finding of fact that "defendant had notice of the order of this Court entered October 30, 1975, directing him to make certain installments" (DSA 101)? Appellant contends that there was a failure of such evidence.

4. Did the Court below err in stating as a finding of fact that:

> "At no time subsequent to the entry of the order on October 30, 1975 and prior to the return date of this motion on December 9, 1975, did defendant move or otherwise take steps to explain or represent to the Court any reasons why he could not comply with the order and make the payments required thereunder." (DSA 102)

Appellant contends that the Court below was in error in making such a finding of fact.

POINT I

THE PROCEDURE FOLLOWED BY THE DISTRICT COURT IS UNCONSTITUTIONAL AND BASED ON AN UNCONSTITUTIONAL STATUTORY FOUNDATION AND RULE.

The Fourth Amendment to the United States Constitution governs arrest and detention. It provides, in pertinent part:

> "The right of the people to be secure in their persons *** against unreasonable *** seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ***."

The Fifth Amendment to the Constitution provides, in pertinent part:

> "No person shall *** be deprived of *** liberty *** without due process of law ***."

The authorities make it clear that the failure to afford a debtor an opportunity to be heard before he is incarcerated deprives the debtor of due process of law, since the fundamental requisite of due process of law is the opportunity to be heard.

> Desmond v. Hachey, 315 Fed. Supp. 328, 332 (D.C. Me., S.D., 1970)
>
> Vail v. Quinlan, supra, at page 11
>
> Fuentes v. Shevin, 92 Sup. Ct., 1983, 407 U.S. 87 (1972)

While it is certainly clear that the District Court has the inherent power to punish disobedience of its orders, the grant of that power conveys no exemption from the specific constitutional protections afforded individuals with respect to the guarantee of due process of law as well as to freedom from unreasonable arrest and detention.

Parker v. United States 153 F.2d 66
(1st Civ 1946)

The contempt here involved is a civil contempt as distinguished from a criminal contempt.

17 F.R.D. 167 et seq.

Generally speaking, the distinction may be made that civil contempt proceedings are remedial in nature, and criminal contempt proceedings are punitive.

Gompers v. Buck's Stove & Range Co.,
31 Sup. Ct. 492, 221 U.S. 418 (1911).

While there is no specific statutory authorization or limitation in Federal law with respect to punishment of civil, as distinguished from criminal contempts, it has been said to be "tacitly assumed" that 18 U.S.C.A., §401, operates as a limitation of the power of Federal courts with respect to civil contempt actions.

See Raynor Ballroom Co. v. Buck,
110 Fed. 2d 207 (1st Cir.1940).

Also see Penfield Co. of California v.S.E.C., 330 U.S. 585, 594, 67 Sup. Ct. 918 (1947).

§401 of Title 18 U.S.C.A., provides:

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

In the instant case, the original installment payment order with which appellant did not comply, and which is the foundation of the contempt proceeding, was made pursuant to the New York State law, CPLR §5226. The New York law further provides in CPLR §5251 that refusal and willful neglect to obey such an order "shall each be punishable as a contempt of Court." The statutory scheme then requires reference to Article 19 of the New York State Judiciary Law.

See McKinney's Civil Practice Law and Rules, Supplementary Practice Commentaries to CPLR 5251 by David D. Siegel, Vol. 7B, pp. 199-200.

§754 of Article 19 of the Judiciary Law provides an exclusive remedy for civil contempt as follows:

> "***. In a case specified in section seven hundred and fifty-three, or in any other case where it is specially prescribed by law, that a court of record, or a judge thereof, or a referee appointed by the court, has power to punish, by fine and imprisonment, or either, or generally as a contempt, a neglect or violation of duty, or other misconduct; and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, impaired, impeded, or prejudiced thereby, the offense must be punished as prescribed in the following sections of this article." (emphasis ours)

Under §755 of Article 19, entitled "When Punishment may be Summary", the only circumstance permitting summary detention and punishment for civil contempt is the case "where the offense is committed in the immediate view and presence of the Court, or of the judge or referee, upon a trial or hearing."

The following section of Article 19, §756, provides that, in the instance where the offense "consists of a neglect or refusal to obey an order of the Court, requiring the payment of costs, or of a specified sum of money *** it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law."

That section has been determined to be unconstitutional as violative of the due process clause of the Fourteenth Amendment of the United States Constitution, and to be "void and may no longer be enforced."

Vail v. Quinlan, supra, at page 2

§770 of Article 19 of the Judiciary Law of the State of New York relates to the final order directing punishment and authorizes the imposition of a fine or imprisonment or both.

The latter section has now been declared by a three-judge Court to be unconstitutional under the Due Process Clause of the Fourteenth Amendment and to be "void and may no longer be enforced."

Vail v. Quinlan, supra, page 2

§§ 772 and 773 of the same Article of the Judiciary Law authorize the determination of the questions which may arise "as upon any other motion", and authorize the imposition of a fine to be imposed upon the offender, collected and paid over to the aggrieved party.

Again, those sections have been declared unconstitutional and void by Vail, supra.

As above noted, Rule 69(a) of the Federal Rules of Civil Procedure makes applicable the State enforcement procedures. Since §754 of the New York State Judiciary Law provides an exclusive remedy for punishment of violators of the State procedure, there remains no statutory authority to support the punishment procedures set forth in Rule 14 of the Civil Rules of the Southern and Eastern District Courts.

Even were that not the case, Rule 14 would nevertheless be required to satisfy minimum Constitutional guarantees. This it does not do.

Rule 14 provides that a proceeding to adjudicate a person in civil contempt of the Court may be based upon a notice of motion or order to show cause supported only by an affidavit. This is insufficient to meet constitutional requirements.

> "Due process requires more than the mere opportunity to be heard when the interest involved is deprivation of the debtor's liberty. The statutory scheme presently allows imprisonment only on the basis of a creditor's affidavit of service and an ex parte proceeding. A finding of contempt can be properly made only upon a hearing with both parties present."
>
> Vail v. Quinlan, supra, at page 10
>
> McNeil v. Director, Patuxent Institution, 407 U.S. 245, 251 (1972).
>
> Harris v. United States, 382 U.S. 162, 167 (1965).

Furthermore, as interpreted by the District Court, Rule 14 permits issuance of an order to show cause and, in fact, a determination of all issues with respect to the debtor's contempt based solely on an attorney's affidavit. In the instant case, the only affidavit submitted in support of the order to show cause was the affidavit of Victor A. Kovner, Esq., sworn to December 3, 1975 (DSA 5-10). Yet the Court below interpreted Rule 14 as authorizing an adjudication of contempt, and imposition of punishment, based solely on that affidavit. That procedure fails to meet the requirements of Vail, supra. (at p. 10)

Additionally, Rule 14 provides that where the alleged contemnor has appeared in the action by an attorney, the notice of motion or order to show cause and the supporting papers may be served upon his attorney. In view of rulings that the "attorney" referred to is the attorney who appeared in the primary action in which the judgment was entered, this Rule as so interpreted permits a finding of contempt and an order of imprisonment to be made when the alleged contemnor may never have received actual notice of the application by the creditor.

Furthermore, the order to show cause which brought on the contempt proceeding and resulted in the order appealed from, in specifying the relief sought on the motion, disclosed

only that the appellant was required to show cause:

> "why an order pursuant to local Civil Rule 14 should not be made herein, adjudging the said Morton L. Annis in contempt of this Court to be dealt with accordingly and granting such relief to plaintiff as may be proper, including reasonable attorney's fees on this application ***." (DSA 3-4).

The District Court interpreted Rule 14 to permit such a limited notice and nothing in Rule 14 negates that interpretation. Yet, as stated in Vail, supra, at page 11:

> "A concomitant to a fair hearing is notice appropriate to the nature of the case. Here, notice must be complete and clear, given the substantial deprivation of liberty that may result from failure to respond. Fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment."

See also Lynch v. Baxley, 386 Fed. Supp. 378 (D.C. Ala., 1974)

Further, Rule 14 provides, in subparagraph (c), that the Court may fix a fine, including the damages found to have been sustained by the complainant, and naming the person to whom such fine shall be payable; and the debtor's confinement is conditioned upon payment of the fine. The Rule contains no

requirement that there be a finding that the debtor has the capability to pay the fine and, in fact, permits requiring the additional payment of a reasonable counsel fee as part of the fine. As stated by the Court in Vail, supra at p. 11.

> "If coercion is the purpose of the sanction, it can be justified only if the person has the ability to comply. The absence of procedural safeguards of indictment and jury trial can be justified only by the conditional nature of the imprisonment and the contemnor's continued defiance ***. To the extent, therefore, that the fines and imprisonment contained in the Judiciary Law are punitive, they cannot be imposed in a civil contempt proceeding."

In the instant case, the Court's interpretation of Rule 14 did not require, nor did the Court make, any determination whether the Appellant had the ability to comply with the fine. This falls short of meeting the constitutional standards declared in the Vail case, supra.

To complete the constitutional deficiency of Local Rule 14, subsection (b) to be sure, recognizes the debtor's right to a trial by jury, but it provides that, unless written demand is made on or before the return day of the application, the debtor shall be "deemed to have waived" that right. There is no requirement that the notice to the debtor advise him of the necessity for such written demand; and there is no statutory

authority pursuant to which such a waiver may be imposed.

"Trial by jury is a vital and cherished right, integral in our judicial system"

City of Morgantown v. Royal Ins. Co. 373 U.S. 254, 258, 69 S. Ct. 1067 (1949).

The Seventh Amendment to the United States Constitution expressly preserves the right to trial by jury. While FRCP 38 and 39, requiring a demand to be made for jury trial, have been upheld constitutionally, these rules permit such demand to be made "not later than 10 days after the service of the last pleading directed to such issue."

Rule 14, however, shortens that period to "the return day or adjourned day of the application". In the instant case, only six days elapsed from service of the order to show cause bringing on the application to the return date, which was also the date of the Court's determination of the motion. The issues to be tried were raised only on the return day, when appellant's answering papers were filed as required.

No statutory authority exists for the curtailment of the debtor's right to jury trial. Whether or not the Court, in this instance, might constitutionally punish the Appellant

without a jury trial, in the absence of the Rule, need not here be decided. The local Rule saw fit to afford Appellant that right. Due process requires that Appellant be given notice of the peril of waiver of so basic a right. It further requires that, the right having been recognized, waiver be limited to the only statutory authority existing, Rules 38 and 39 FRCP. We submit that the local Court Rule (R. 14 Civ.) involves, therefore, a denial of Constitutional due process of law.

It is clear that, by statute, in criminal contempt proceedings, the defendant is entitled to a jury trial, conforming as near as practicable, to practice in other criminal cases (18 U.S.C. §3691).

> As stated in Vail v. Quinlan, supra, at p. 11:
>
> "Surely, a debtor who is deprived of his liberty is as much entitled to due process as is a defendant charged with a crime."

It may be argued that, in cases of contempt citations which are exclusively coercive in nature, and the defendant may secure his freedom by compliance, jury trial is not required. (Bacon v. U.S. 446 F. (2d) 667 (C.C.A. 9th 1971). That rule, even if, arguendo, it complies with constitutional requirements, is subject to the same condition noted heretofore that civil

contempt commitment, without the safeguards of jury trial and similar protections, depends for its validity on the defendant's ability to comply with an expressed condition of his release from imprisonment. As interpreted by the Court below, Rule 14 requires no finding that defendant has such ability.* Accordingly, the local Rule (as the Order below) must fall as beyond the Court's power.

Shillitani v. United States,
384 U.S. 369, 371, 86 S.Ct. 1531 (1966)

See Parker v. U.S., 153 F. (2d) 66 (C.C.A. 1st, 1946)

---

*No such finding was in fact made. (DSA 101-2)

POINT II

THE COURT BELOW ERRED IN HOLDING APPELLANT IN CONTEMPT OF IT'S INSTALLMENT PAYMENT ORDER AND IN ORDERING HIS INCARCERATION AND THE PAYMENT OF A FINE WITHOUT HOLDING AN EVIDENTIARY HEARING TO DETERMINE HIS ABILITY TO MEET THE REQUIREMENTS OF THE INSTALLMENT PAYMENT ORDER.

The Court below was in error in exercising jurisdiction to punish Appellant for contempt without holding any hearing on the issue of the Appellant's present ability to comply with the terms of the installment payment order. In this regard, the New York law controls. Matter of Caruso v. Schilingo 23 App. Div. 2d 627, 257 N.Y.S. 2d 719 (4th Dept. 1965).

> "In matters of this type when it appears that there may be financial inability better practice would dictate that before an order of contempt issue the judgment debtor be brought before the court and examined by the judge to determine his financial status and the possibility of payments in the amount ordered." (257 NYS 2d at 721)

To the same effect see Uni-Serv Corporation v. Linker, 311 N.Y.S. 2d 726 (Civ Ct NY 1970); Diamond & Frazer Iron Works v. DiTullio, 284 N.Y.S. 658 (City Ct, Bronx, 1935). Sure Fire Fuel Corp. V. Martinez, 348 N.Y.S. 2d 502 (Civ Ct NY 1973).

In an attempt to avoid punishment, judgment debtors will often seek a modification of the installment payment order in

the course of contempt proceedings. Appellant took such a stance on appellee's motion to have him held in contempt of court and in fact, cross-moved for an amendment or modification of the installment payment order (DSA 21-38).

The courts generally will permit this type of collateral attack on the original order and refuse to punish the debtor if he can establish his inability to make the payments. See Weinstein-Korn-Miller, New York Civil Practice § 5226.23, at 52-416-417 (1974) and the cases cited thereunder.

Especially should this be so in the instant case in view of the fact that installment payment orders issued by the Court below are subject to modification from time to time upon motion of either party and a showing of changed circumstances. See: McDonnell v. Birrell, 321 Fed. 2d 946, 947 (2d Circuit 1963).

Under New York Law, Courts certainly have the inherent power to modify or vacate installment payment orders in an action or proceeding still pending. Uni-Serv Corp. v Linker, supra; Ladd v. Stevenson, 112 NY 325, 332 (1889); Leichter, Civil Motion Practice, Sec. 45.05.

A finding of contempt can be properly made only upon a hearing with both parties present. Vail v. Quinlin, supra, at p.10; McNeil v. Director, Patuxent Institution, 402 U.S. 245, 251

(1972) and, if a hearing is to serve it's full purpose, it must be held before, not after imprisonment. Vail v. Quinlin, supra, at p.11 ; Fuentes v. Shevin, supra.

As the Court stated in McNeil v. Director at pp 2087-2088, in citing Maggio v. Zeitz, 333 U.S. 56, 68, S. Ct. 401 (1948):

> "Civil contempt is coercive in nature, and consequently there is no justification for confining on a civil contempt theory a person who lacks the present ability to comply."

No such hearing was ever held by the Court below prior to it's issuance of the order of contempt, although duly demanded (DSA 37). The only basis for the Court below's determination that the appellant had the ability to meet the requirements of the installment payment order was the affidavit of Victor A. Kovner, appellee's counsel, duly sworn to December 3, 1975 (DSA 5 - 10). It is clear under New York law that contempt should not be determined by default or on an affidavit by the attorney for the appellee. Matter of Caruso v. Schilingo, supra; Uni-Serv Corporation v. Linker, 311 NYS 2d 726, 730 (NY Civil Ct, 1970).

What the Court below should have done on the return of the appellee's motion for contempt was to have held that motion in abeyance pending the appellant's examination by the Court, or a referee of the Court to determine appellant's

financial status and ability to make the installment payments previously ordered. This was appellant's right as a matter of law. F. E. Compton v. Williams, 290 NYS 2d 984 (4th Dept., 1936); Matter of Caruso v. Schilingo, supra; Uni-Serv Corp. v. Linker, supra; Sure Fire Fuel Corp. v. Martinez, supra.

As the Court stated in the Sure Fire Fuel Corp. case:

> "In criminal contempt proceedings the United States Supreme Court has held that procedural due process "requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation" (In re Green, 369 U.S. 689, 691 692, 82 S.Ct. 1114, 1116, 8 L.Ed.2d 198, 201 (1962); In re Oliver, 333 U.S. 257, 275, 68 S.Ct. 499, 508, 92 L.Ed. 682, 695 (1947). Similarly, in civil proceedings the individual's fundamental right to procedural due process should not be violated, especially in view of the severe penalties which may be imposed. Here, certainly, "the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner'" (Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1973, 1994, 32 L.Ed.2d 556, 570 (1972)." 348 NYS 2d at 505-506.

"The fact that the judgment debtor has failed to comply with the order does not of itself render the defendant

guilty of contumacious conduct calculated to defeat, impair, impede and prejudcie the rights and remedies of the plaintiff." Sure Fire Fuel Corp. v. Martinez, supra. "If a debtor is directed to pay installments out of his income and he has no income during certain periods he does not disobey the mandate by failing to make payments on such occasions and cannot be punished for contempt. [At a subsequent hearing] the debtor, of course, carries the burden of establishing that he had no income out of which to pay the installments". In re Stupplebeen, Misc. 987, 989, 14 N.Y.S.2d 756,758 (Columbia County Ct, 1938).

The appellant sought an opportunity for an evidentiary hearing to determine his ability to meet the requirements of the installment payment order. Such an opportunity was denied and accordingly, the Court below was in error.

A. THE COURT BELOW DID NOT PROPERLY COMPLY WITH RULE 14b OF THE CIVIL RULES FOR THE SOUTHERN DISTRICT

The Civil Rules of the United States District Court for the Southern and Eastern District, Rule 14 (b) provides that:

> "If the alleged contemnor puts in issue his alleged misconduct or the damages thereby occasioned, he shall upon demand therefor, be entitled to have oral evidence taken thereon, either before the Court or before a master appointed by the court."

The appellant expressly placed in issue before the Court below his alleged misconduct and requested that a hearing be held, Yet, the Court below chose to ignore such request and by doing so,violated Rule 14b of it's own Civil Rules.

The affidavit of Leslie D. Corwin, sworn to December 8, 1975 (DSA 23-38) and submitted in opposition to appellee's motion to have appellant held in contempt of Court, expressly placed in issue the appellant's ability to meet the requirements of the installment payment order. In addition to the issues of mixed fact and law raised by the Corwin affidavit, the said affidavit raised the factual issues that the appellant "is semi-retired and for over a year has suffered from cancer and has been in and out of hospitals; he receives Cobalt treatment and has incurred large hospital bills and related expenses; he is "in dire financial straits and is in no position to meet the stringent monetary requirements for sufficient security for the payment of judgment currently entered against him***" DSA 24); that the order directed the defendant to pay money "which is not conditioned on the receipt of income" (DSA 34); that the payments which were required to be made by the Order fit within the Federal definition of garnishment contained in the Federal Garnishment Law, 15 USC, Sections 1671 through 1677, which impose a percentage limitation on the amount of earnings

which may be the subject of an installment payment order; that the Order directing that payment out of monies entitled to be received rather than those payments which the Appellant was actually shown to have received; that documentary evidence annexed to the Corwin affidavit showed that a basic assumption made by the Court that income to which the Appellant was entitled under the Master Packaging Agreement would continue, was erroneouse since the documentation showed that the agreement expired July 2, 1978 (DSA 28-34).

Most importantly, the Corwin affidavit argued that the Appellant should be granted "an opportunity to be examined by the Court or a Magistrate of this Court*** to determine his financial status and his ability to make the installment payments previously ordered. This is his right as a matter of law" (DSA 37).

Appellant earlier in this brief ha challenged Rule 14 of the Civil Rules for the Southern and Eastern Districts as not being justified by any statute and consequently, without constitutional authority.

As a matter of law, if there are available two interpretations of a statute or a rule, one that renders it constitutional and one that renders it unconstitutional, the

presumption is in favor of that interpretation which will render it constitutional. Accordingly, should this Court deem Rule 14 to be constitutional then it must also see to it that that Rule is properly followed by the District Courts which it governs. Appellant submits that the Court below did not follow Rule 14.

POINT III

THE COURT BELOW WAS IN ERROR IN STATING AS A FINDING OF FACT THAT "DEFENDANT HAD NOTICE OF THE ORDER OF THIS COURT ENTERED OCTOBER 30, 1975, DIRECTING HIM TO MAKE INSTALLMENT PAYMENTS."

The order for contempt signed by the Court below on December 18, 1975, states as finding of fact number one (1) that "defendant had notice of the Order of this Court entered October 30, 1975, directing him to make certain installment payments". That finding is utterly without foundation on the record. The Appellee made no effort to prove and there was no proof adduced that the Appellant had any notice of the Order. The requirement is of <u>personal</u> notice and the record is barren of any such proof.

The contempt order purports to be based upon the practice and procedure of the New York Civil Practice Laws and Rules and in particular, CPLR § 5226. That section requires in pertinent part that:

> "Notice of the motion shall be served on the Judgment Debtor in the same manner as a summons or by registered or certified mail, return receipt requested."

This provision was not complied with by the Appellee in that notice was not served in the manner provided.

Again under the New York State law, contempt based on efforts to enforce money judgments are subject to the provisions of CPLR § 5104. That section requires that the order, non compliance of which constitutes the basis for the alleged contempt, must be:

> "Enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the Court."

No certified or other copy of the order was ever served upon the Judgment Debtor as required by that provision (DSA 115).

Furthermore, the fact that a Notice of Appeal was filed by the Appellant's attorneys does not demonstrate Appellant's knowledge of the terms and provisions of the installment payment order, for the only proof in the record shows that the draft Notice of Appeal was prepared by a Florida attorney for the Appellant (DSA 14-15). This we submit does not meet the requirements of the kind of notice required to found a contempt citation which would result in personal imprisonment. In fact, it was precisely this type of practice that the three judge panel must have had in mind in Vail v. Quinlan supra. when it declared Sections 756, 757, 770, 772, 773, 774 and 775

of Article 19 of the New York Judiciary Law to be violative of the due process clause of the Fourteenth Amendment of the United States Constitution and held that "they are void and may no longer be enforced." As Judge MacMahon stated at page 11 in Vail v. Quinlan: "A concomitant to a fair hearing is notice appropriate to the nature of the case." See also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

Proceedings to punish for contempt are personal, and where there is nothing to show that the defendant has been served personally with notice of the application (to hold him in contempt) he should not be committed for a contempt. Lefavour v. Whitman Shoe Co., 65 F. 785 (Cir. Ct. N.Y. 1894).

POINT IV

THE COURT BELOW ALSO ERRED IN BASING THE CONTEMPT ORDER ON IT'S FOURTH FINDING OF FACT.

The Court below stated as it's fourth finding of fact on which to base the order adjudging appellant in contempt the following:

> "At no time subsequent to the entry of the order on October 30, 1975 and prior to the return date of this motion on December 9, 1975, did defendant move or otherwise take steps to explain or represent to the Court any reasons why he could not comply with the order and make the payments required thereunder."

This was a highly unfair finding for the Court below to make for the record is entirely bare of any proof or suggestion that the appellant knew of the terms of the installment payment order during that time interval.

The law is clear in this jurisdiction that a judgment debtor has the right at any time to seek a modification of an installment payment order. McDonnell v. Birrell, supra. There is no limitation whatsoever as to the time interval involved.

Furthermore, Rule 14 of the Civil Rules of the United States District Court for the Southern and Eastern Districts also makes it clear that an alleged contemnor can put in issue his

alleged misconduct at any time. Nowhere in that Rule is there any requirement that such an issue must be raised prior to the service of the notice of motion or order to show cause.

CONCLUSION

THE ORDER OF THE COURT BELOW SHOULD BE REVERSED IN ITS ENTIRETY.

Respectfully submitted,

RICH, KRINSLY, POSES, KATZ & LILLIENSTEIN
Attorneys for Defendant, Judgment-Debtor, Appellant
99 Park Avenue
New York, New York 10016
(212) 867-7200

NORTON I. KATZ
LESLIE D. CORWIN
Of Counsel

75-7669

C 17

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of January, one thousand nine hundred and seventy-six.

Weitnauer Trading Company, Ltd.,

Plaintiff-Judgment Creditor-Appellee,

v.

Morton L. Annis,

Defendant-Judgment Debtor-Appellant.

It is hereby ordered that the motion made herein by counsel for the

appellant ~~appellee~~ ~~petitioner~~ ~~respondent~~

by notice of motion dated December 18, 1975 for a stay pending appeal

be and it hereby is ~~granted~~ denied, with $100 costs against appellant, to be paid to appellee within 10 days of the date of this order.

It is further ordered that appellant and his attorney are hereby enjoined from filing in this Court any further motion for a stay pending appeal or any motion seeking similar relief.